Supreme Court, U.S.
FILED
OCT 6 1987
JOSEPH F. SPANIOL, JR.
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No. 87-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND EDMUND B. LEWIS, JR.,

Petitioners,

VS.

NABISCO BRANDS, INC.

Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF ABBREVIATIONS

For the convenience of the Court, the following abbreviations will be used in Petitioners' Reply Brief:

Transcript of Proceeding in District Court for the Eastern District of Texas	TR.
Record/Pleadings in District Court for the Eastern District of Texas	R.
Petitioners' Petition for Writ of Certiorari	P BR.
Brief of Respondent	R BR.

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No. 87-274

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FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND EDMUND B. LEWIS, JR.,

Petitioners[1]

VS.

NABISCO BRANDS, INC.

Respondent[2]

PETITIONERS' REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION

FRANK D. BUNTON, CERF HIRSCH, JAN HIRSCH VAN HORN, JOE CORDILL, MRS. JOHN MEREDITH and EDMUND B. LEWIS, JR., respectfully submit their Reply Brief to Brief of Respondent in the above entitled case.

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[1] Petitioners are: Frank D. Bunton, Cerf Hirsch, Jan Hirsch Van Horn, Joe Cordill, Mrs. John Meredith and Edmund B. Lewis, Jr.

[2] Respondent is: Nabisco Brands, Inc., a Delaware corporation that is a wholly owned subsidiary of R. J. Reynolds, Inc.

REPLY ARGUMENT

I.

NABISCO BRANDS, INC.'S SELF TENDER OFFER FOR PETITIONERS' $3.50 CUMULATIVE PREFERRED STOCK WAS FRAUDULENT, COERCIVE AND A VIOLATION OF FEDERAL SECURITIES LAW AND NABISCO'S CERTIFICATE OF INCORPORATION

Nabisco attempts to characterize their self tender offer as a "garden variety" offer. R BR 1. However, a close review of Nabisco's self tender offer/defacto redemption reveals a very calculated and deceptive use of the self tender in order to avoid redeeming the preferred stock and to "freeze out" or coerce the Petitioners into tendering their $3.50 Cumulative Preferred Stock.

Nabisco in its' brief in opposition to Petitioners' Petition for Writ of Certiorari conveniently avoids a response to the most important points set forth by Petitioners regarding Petitioners' securities law violations, breach of contract, fiduciary duty and fraud causes of action.

First, Nabisco fails to address Petitioners' discussion of the six million dollar profit Nabisco realized on the self tender/defacto redemption of the $3.50 Cumulative Preferred Stock. Throughout this lawsuit, Nabisco has attempted to portray the Petitioners as unreasonably attempting to obtain an additional $50.00 per share to which they were allegedly not entitled.

Whereas, upon close review of the transaction, Nabisco realized a six million dollar profit on the transaction without disclosing the profit to their shareholders. (TR. 123-126). Further, knowing that the self tender/defacto redemption would make Nabisco a six million dollar profit, Nabisco advised their $3.50 Cumulative Preferred shareholders to tender their shares. (TR. 109; 169). Nabisco contends that contractually it had the right to use any legal method to buy

its shares. However, Nabisco did not have the right to misinform and deceive its shareholders into tendering their $3.50 Cumulative Preferred Shares. R BR 3. Clearly, this type of behavior by a corporation in connection with a self tender offer, is fraudulent, coercive and a breach of its fiduciary duty to its shareholders.

In addition, Nabisco contends that its intention to delist the stock was not coercive. R BR 15. It is inconceivable how Nabisco can take this position when the tender offer documents stated:

> *Upon completion of the Offer, however, the Company intends to apply for delisting of such stock from trading on the New York Stock Exchange* and termination of registration of such stock under the Securities Exchange Act of 1934. (Emphasis added) (R. 73).

The tender offer documents did not state why Nabisco intended to delist the stock nor, did the documents advise the shareholders why Nabisco would apply for delisting at the end of the offer. The Nabisco self tender offer documents only disclosed to the $3.50 Cumulative Preferred shareholders that at the end of the self tender, Nabisco would no longer trade its $3.50 Cumulative Preferred Stock on the New York Stock Exchange. Therefore, Petitioners had to tender their shares or lose the market for their shares.

As a result, this well disguised coercive self tender offer/defacto redemption of Nabisco, forced Petitioners to make a decision regarding Nabisco's self tender without complete and proper disclosure by Nabisco. Further, the coercive self tender/defacto redemption forced the Petitioners to accept the fifty dollar ($50.00) tender offer. Petitioners had to accept the Nabisco self tender offer in order to protect themselves against having no market on which to trade their shares. Petitioners also had to protect themselves against potentially losing the entire value of their shares.

Nabisco's unilateral actions therefore adversely affected Petitioners. Accordingly, Nabisco breached its Certificate of

Incorporation. P BR 6-10; (R 83-84). To allow Nabisco and large corporations like Nabisco to: conduct business in the public securities markets in the above described manner, breach its contracts with its shareholders and, disguise such a breach as a "benefit" to the shareholders, is contrary to the strong public policy of protecting the average private investor from the overwhelming power of large corporations.

II.

PETITIONERS DID NOT WAIVE THEIR OBJECTION TO THE TRIAL COURT'S INSTRUCTION REGARDING THE APPLICATION OF THE TWO YEAR STATUTE OF LIMITATIONS

Petitioners submit that Nabisco has misconstrued the application Rule 51 of the Federal Rules of Civil Procedure to the facts in this case. The question of what is the applicable period of limitations for breach of fiduciary duty and fraud is a question of law and not a jury question. *Smart v. Texas American Bank/Galleria*, 680 S.W. 2d 896, 898 (Tex. App. — Houston [1st Dist.] 1984, no writ).

It is undisputed that Petitioners brought this suit within four years. (R. 92). Therefore, Petitioners suit was not barred by the four year statute of limitations and the issue that the jury was required to answer was whether the case was brought within two years from the date Petitioners knew or should have known about the fraud. Accordingly, pursuant to Rule 51 of Federal Rules of Civil Procedure, Petitioners were not required to object to the trial court's instruction since, Petitioners filed their suit within four years. (R. 92).

Even if one were to assume arguendo, that an objection was required in the trial court to the Court's instruction regarding the applicable limitations period for breach of fiduciary duty and fraud, Petitioners did not waive their

objection to the instruction; since, the trial court's instruction is reviewable under the "plain error" standard of Rule 51 of Federal Rules of Civil Procedure.

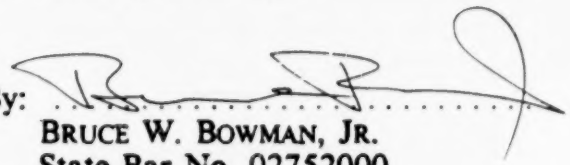
Pursuant to Rule 51, it is the responsibility of the trial judge to provide the jury with a clear and accurate statement of the law that the jury is expected to apply in reaching its verdict. *McPhee v. Reichel*, 461 F.2d 947, 950 (3rd Cir. 1972) *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1372 (5th Cir. 1959). Therefore, if the trial judge fails to properly instruct the jury as to the correctness of the law, this Court has the authority to review the instruction under the "plain error" standard of Rule 51 in order to correct obvious instances of injustice and misapplied law. *City of Newport v. Fact Concerts*, Inc., 453 U.S. 245, 256 (1981); *Sandridge v. Salem Offshore Drilling Co.*, 764 F.2d 252, 257 (5th Cir. 1985).

In this case, the trial judge incorrectly instructed the jury that the Texas two year statute of limitations applies to breaches of fiduciary duty and fraud. (TR. 212-213). Therefore, this Court under the "plain error" standard should correct this obvious misstatement of the law by the trial court.

CONCLUSION

Petitioners respectfully urge, for all reasons set forth above, that the judgments of the District Court for the Eastern District of Texas and the Fifth Circuit Court of Appeals require a reversal by this Court. Accordingly, Petitioners request this Court to Grant a Writ of Certiorari to review the judgments of the District Court for the Eastern District of Texas and the Fifth Circuit Court of Appeals.

Respectfully submitted,

By: 

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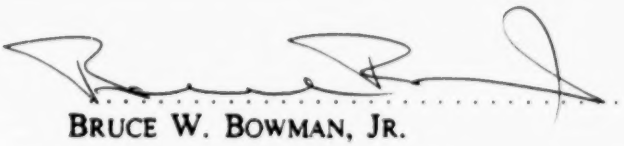
CERTIFICATE OF SERVICE

I, Bruce W. Bowman, Jr., do hereby certify that on the 5th day of October, 1987, I served, via prepaid first class mail, three (3) copies of the foregoing Petitioners' Reply Brief to Brief of Respondent, on counsel for Respondent, Burton Brody, Esq., Nabisco Brands, Inc., 625 Madison Avenue, New York, New York 10022.

I further certify that all parties required to be served have been served.



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